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No. 08-____

IN THE

Supreme Court of the United States

DELMARVA POWER & LIGHT COMPANY and
ATLANTIC CITY ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES and
PSEG NUCLEAR, LLC and
PUBLIC SERVICE ELECTRIC AND GAS CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Despite collecting more than $20 billion from owners of nuclear power plants to construct a national repository for spent nuclear fuel (SNF), the Government failed to build the repository and defaulted on its obligation to remove SNF from the nuclear plants. This default required nuclear plants to set aside property for the indefinite storage of SNF, which resulted in a taking of private property. Nuclear plant owners who were required to divest their interests in nuclear plants and received distressed prices filed Fifth Amendment takings claims seeking just compensation equal to the diminished value of their interests. Under *United States v. Dow*, a Fifth Amendment claim may only be brought by the owner of the property at the time of the taking. Under the Claims Act, no unallowed claim against the Government may be voluntarily assigned. Here, the Government asserted that the sellers assigned their takings claims to the purchasers; conceded that the assignments were invalid; purported nonetheless to consent to the assignments; and then asserted that the claims were worthless in the hands of the purchasers who benefited from the diminished value. The judgment below validates the Government's consent.

The Question Presented is:

Whether the United States may consent to the assignment of an unallowed claim when the assignment is in contravention of *Dow* and concededly invalid under the Claims Act; and, if so, whether it may do so if the consent allows the United States to avoid paying just compensation for a taking of private property as required by the Fifth Amendment.

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Federal Circuit were: Delmarva Power & Light Company and Atlantic City Electric Company, the Plaintiffs-Appellants below; the United States, a Defendant-Appellee below; and PSEG Nuclear, LLC and Public Service Electric and Gas Co., also Defendants-Appellees below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Delmarva Power & Light Company and Atlantic City Electric Company are each wholly owned subsidiaries of Conectiv, a Delaware company that is a wholly owned subsidiary of Pepco Holdings, Inc., which is a public utility holding company incorporated in Delaware.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Delmarva Power & Light Company (Delmarva) and Atlantic City Electric Company (ACE, and together with Delmarva, ACE/Delmarva) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit affirming the judgment of the United States Court of Federal Claims (COFC) granting summary judgment for the United States.

OPINIONS BELOW

The opinion of the Federal Circuit affirming the judgment of the COFC is reported at 542 F.3d 889

and is reprinted in the Appendix hereto at 1a-10a. The opinion of the COFC granting summary judgment to the United States is reported at 79 Fed. Cl. 205 and is reprinted at 11a-40a.

JURISDICTION

The Federal Circuit issued its judgment on September 18, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Federal Circuit had jurisdiction under 28 U.S.C. § 1295(a)(3). The COFC had jurisdiction under 28 U.S.C. § 1491.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions of the Fifth Amendment to the United States Constitution, the Assignment of Claims Act, 31 U.S.C. § 3727 (formerly 31 U.S.C. § 203) (Claims Act), and the Assignment of Contracts Act, 41 U.S.C. § 15 (Contracts Act), are set out in the Appendix hereto at 41a-50a.

INTRODUCTION

This case presents this Court with the opportunity to answer a compelling Constitutional question: whether the United States may escape its Fifth Amendment obligation to pay just compensation for the taking of private property by engaging in litigation tactics that, as described by the lower court, "vitiate" a federal statute (36a), and produce a result in direct conflict with *United States v. Dow*, 357 U.S. 17 (1958). *Dow* holds that only the owner of property at the time of the taking, not a subsequent owner, is entitled to compensation, and reaffirms that takings claims may not be transferred in violation of the Claims Act. The Claims Act is designed to shield the Government from trafficking in claims against it by

voiding assignments of claims against the Government before those claims are allowed. Here, for the first time since the Claims Act was enacted in 1853, the Government has purported to "waive" the statute to effectuate the transfer of unliquidated takings claims from a seller to a buyer. Having engaged in conduct that diminished the value of a seller's property, the Government says to the seller: "Sorry, you assigned any takings claims you may have had to the buyer of your property. We've consented to that assignment and we owe you nothing." To the buyer, the Government says: "Sorry, the takings claims that were assigned to you are exactly offset by the reduced purchase price you paid for the devalued property. We owe you nothing."

The astonishing result is that, if the waiver device is condoned by this Court, the Government may extinguish a seller's takings claim without paying just compensation for the taking – to anyone – in direct violation of the Fifth Amendment. The immediate effect of the Federal Circuit's decision is to preclude ACE/Delmarva from pursuing on behalf of their electric customers takings claims against the Government, estimated to be valued at $80 to $100 million, for breach of its obligation to remove SNF from nuclear power plant sites. The decision will also have significantly broader impacts. For example, to ACE/Delmarva's knowledge, at least five other utilities – representing the interests of more than three million ratepayers – have sold interests in nuclear properties and have also brought takings claims against the Government.[1] In aggregate, those tak-

[1] Claimants before the COFC include: The Canal Electric Company, Case No. 04-0035C (interest of Canal in Seabrook plant sold to Florida Power & Light Company); Rochester Gas &

ings claims are likely to amount to hundreds of millions of dollars.

The decision below has broad applicability beyond the nuclear fuel cases: it gives the Government a new tool to brandish in any case involving the transfer of property impacted by a Government taking. That new weapon could be used at any time, for any reason, including the complete extinguishment of claims for just compensation. In the past, takings claims have arisen against the Government where, for example, Government action to control flooding, mining activities, dumping of spoil, wetlands degradation, or air quality impacts has reduced the value of private property. With the certain advent of new programs relating to climate change, such as the proposed designation of "corridors" or "reservation areas" for transmission lines, wind farms, geothermal drilling, and other Government purposes, such takings are destined to occur at an ever more rapid pace. Parties who transfer their property subsequent to a taking will find that the Government may, at will, escape liability for just compensation by simply alleging that the takings claim was transferred, consenting to the transfer, and then asserting an offset equal to the value of the claim. This Court should act to prevent that result, which flatly violates the Fifth Amendment to the Constitution, "vitiates" the Claims

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Electric Company, Case No. 04-0118C (interest of Rochester in Ginna plant sold to Constellation Energy, *see infra* p. 7 and note 3); Niagara Mohawk Power Corporation, Case No. 04-0125C (interests of Niagara Mohawk, Rochester, Central Hudson Gas and Electric Corporation and New York State Electric & Gas Corporation in first unit of Nine Mile Point plant sold to Constellation); and Niagara Mohawk Power Corporation, Case No. 04-0124C (interest of Niagara Mohawk in second unit of Nine Mile Point plant sold to Constellation).

Act, and is in direct contravention of controlling Supreme Court precedent.

STATEMENT OF THE CASE

This case involves takings claims arising as a result of the Department of Energy (DOE)'s failure to remove and dispose of SNF accumulating at nuclear power plants, and the Government's subsequent attempt to avoid its Fifth Amendment obligation to pay just compensation for the takings.

DOE's Breach of Its Obligation to Remove SNF

In 1982, Congress enacted the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. §§ 10101-10270, which required the Government "to provide for the permanent disposal of [SNF] . . . in order to protect the public health and safety." 42 U.S.C. § 10131(a)(4). It also required that DOE begin removal of SNF from nuclear power plant sites for storage in a national repository "beginning not later than January 31, 1998." 42 U.S.C. § 10222(a)(5)(B). Each nuclear power plant owner was required to pay significant fees for this service, on average in excess of $100 million per plant.

Despite collecting more than $20 billion in fees, DOE failed to begin removing SNF from nuclear plant sites or to construct a national repository for SNF. As a result, nuclear plants were forced, at considerable cost, to continue storing existing SNF and to set aside property and facilities for indefinite accumulation and storage of additional SNF. This dedication of property to store SNF rendered that property useless for any other purpose, which ACE/Delmarva assert is a taking of private property for Government use that requires just compensation.

Many nuclear plant owners filed claims in the COFC for damages against the Government for its failure to honor its statutory obligation to remove SNF, and in 2000, the Federal Circuit held that the Government is liable for its failure to begin removing SNF by January 31, 1998. *Me. Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (Fed. Cir. 2000). The more than 60 cases now pending before the COFC generally are limited to determining the nature and extent of the damages caused by DOE's failure to perform its obligations.

ACE/Delmarva's Diminished Value Claim

ACE/Delmarva are former owners of interests in three nuclear power plants – the Peach Bottom, Hope Creek, and Salem nuclear stations (the Nuclear Stations). On September 27, 1999, to comply with state and federal regulatory policies, ACE/Delmarva sold their interests in the Nuclear Stations to PSEG Power LLC, parent of PSEG Nuclear, LLC (PSEG), and PECO Energy Company (PECO). Because the value of the Nuclear Stations had been dramatically reduced by DOE's continuing failure to remove SNF, with no end in sight, the prices paid by the purchasers reflected a significantly reduced value for the property and facilities themselves, and were based primarily on the value of live (unspent) nuclear fuel, spare parts, and equipment.

The agreements governing the sales included language to the effect that ACE/Delmarva's claims against the Government were being assigned to PSEG and PECO. In 2001, PSEG sued DOE for contractual breach of its obligation to dispose of the Nu-

clear Stations' SNF, a case which is currently pending in the COFC.[2]

In September 2003, ACE/Delmarva informed PSEG that they intended to file takings claims against the United States to recover the diminished value of the Nuclear Stations at the time of sale. ACE/Delmarva noted that, despite the broad contract assignment language, such takings claims belong uniquely to ACE/Delmarva as the property owners at the time of the takings and, in any event, the Claims Act would bar their assignment. ACE/Delmarva filed their complaints on January 13, 2004. In September 2004, the Government argued in another SNF case (*Rochester Gas & Elec. Corp. v. United States*, No. 04-0118C (Fed. Cl. filed Jan. 29, 2004)) that assignments of claims against the Government were invalid under the Contracts and Claims Acts.[3] Nonetheless, at a hearing in June 2005, when the COFC asked the Government to take a position regarding the validity of the assignments at issue here, the Government refused to do so.

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[2] *PSEG Nuclear LLC and Public Service Electric and Gas Co. v. United States*, COFC Case No. 01-0551C. PECO later merged into Exelon Generation Company, which also sued DOE. *Exelon Generation Co. v. United States*, COFC Case No. 04-0102C. That lawsuit was settled in August 2004, and a stipulation of dismissal was entered on August 9, 2004.

[3] The COFC held in that case that the NWPA is a statutory override of the Contracts and Claims Acts that permits the assignment of *contract* claims against the Government, but not *takings* claims. *Rochester Gas & Elec. Corp. v. United States*, 65 Fed. Cl. 431, 441 & n.11 (2005) (citing *Dow*). *See infra* p. 11.

The Government's Purported Waiver of the Claims Act

More than two years later, during an August 2007 hearing, the COFC demanded that the Government take a position on the assignment of ACE/Delmarva's claims. (22a.) For the first time in any SNF case – seven years after the alleged assignment, and four years into the litigation of ACE/Delmarva's claims – the Government filed a "Notice Regarding the Assignment of Plaintiffs' Claims" purporting to accept the assignment of ACE/Delmarva's takings claims to PSEG and PECO. (51a-54a.) The Government's acceptance, however, was accompanied by the assertion that the claims would have no value in PSEG's hands because any claims brought by PSEG "would be offset by the benefits that PSEG Nuclear obtained through [its] price reduction" (53a).[4]

The Federal Circuit's Decision Permitting the Claims Act Waiver

The COFC issued its decision on November 13, 2007, finding that the purported assignment violated the Claims Act, but that the Government's "express acceptance of the assignments serves to vitiate the provisions" of the statute. (36a.) Based on its conclusion that the Government may waive the Claims Act, and relegating *Dow* to a footnote (35a n.8), the COFC granted the Government's motion for summary judgment. ACE/Delmarva appealed to the Federal Circuit, which affirmed the COFC. The Federal Cir-

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[4] It also stated that the Government had accepted the purported assignment of ACE/Delmarva's takings claims to PECO's parent, Exelon, thus "extinguishing those claims." (53a.) Exelon has no interest in this litigation as a result of its 2004 settlement with the Government. *See supra* note 2.

cuit acknowledged that the assignment of the takings claims violated the Claims Act on its face. (6a.) However, based on its analysis of cases decided under another statute, the Contracts Act, and without relying on a single Claims Act case, it found that the Government was entitled to waive the Claims Act. (6a-9a.) It ignored *Dow* completely. It also ignored the practical effect of its decision, which is to extinguish ACE/Delmarva's claims for just compensation under the Fifth Amendment.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to reverse the Federal Circuit judgment, which conflicts with the clear language of both the Fifth Amendment and the Claims Act, this Court's holding in *Dow*, and its other well-established Claims Act precedent. The Federal Circuit decision raises an important issue of Constitutional and federal law: whether courts may rewrite the Claims Act to give the United States the power to avoid its Fifth Amendment obligation to pay just compensation for a taking of private property by waiving the ban on assignment of unallowed claims established in the Claims Act. Unless this Court acts to overturn the decision below, the Federal Circuit will have swept away more than a century of Claims Act precedent.

I. This Court Should Grant Certiorari To Reaffirm *Dow*

The Federal Circuit has created an "escape hatch" through which the Government can circumvent *Dow* and avoid paying just compensation for taking private property. The decision permits the transfer of a takings claim from the property owner who suffered the taking to a subsequent purchaser of the property,

who benefitted from the taking by paying a substantially lower price and who therefore has no basis for claiming just compensation. The result – extinguishing the original owner's claim by transferring it to a party that cannot pursue it – is not only nonsensical, it is contrary to the Fifth Amendment command "nor shall private property be taken for public use without just compensation" (41a).

This result also directly conflicts with this Court's decision in *United States v. Dow*, 357 U.S. 17 (1958), which held just compensation is due to the original property owner. *Id.* at 20-21. In *Dow*, the Government had exercised its power of eminent domain to acquire an easement for a pipeline. The primary issue was whether the compensation claim vested in the owners at the time the United States took possession of the easement in 1943, or whether it vested in a later owner who acquired the land before the Government filed a declaration of taking in 1946. *Id.* at 18-19. This Court held that the attempt to convey the claim to the subsequent owner was ineffective because the "Claims Act prohibits the voluntary assignment of a compensation claim against the Government for the taking of property."[5] The *Dow* Court emphasized that "'[since] compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.'"[6]

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[5] *Id.* at 20 (citing *United States v. Shannon*, 342 U.S. 288 (1952)); *see Shannon*, 342 U.S. at 291-93 (deed assigning any claim for damages to the property caused by United States soldiers "falls clearly within the ban" of the Claims Act).

[6] *Dow*, 357 U.S. at 20-21 (alteration in original) (quoting *Danforth v. United States*, 308 U.S. 271, 284 (1939)).

The Federal Circuit ignored *Dow*, and the COFC relegated it to a footnote (35a n.8),[7] even though ACE/Delmarva had held up *Dow* as controlling. Both courts missed the point, grasped by Federal Claims Court Judge Lettow in *Rochester Gas*, that under *Dow*, the Claims Act "bars the assignment of a takings claim against the United States" because "[f]or a party to allege that its property right has been taken, it must have owned the property at the time that the alleged taking occurred." *Rochester Gas & Elec. Corp. v. United States*, 65 Fed. Cl. 431, 441 (2005).

PSEG did not own ACE/Delmarva's interests in the Nuclear Stations at the time of the Government's takings; ACE/Delmarva did. Under *Dow*, ACE/Delmarva's takings claims may not be assigned to PSEG. Nor may they be assigned and then extinguished because, "in the event of a taking, the compensation remedy is required by the Constitution." *First English Evangelical Lutheran Church v. County of Los Angeles, Cal.*, 482 U.S. 304, 316 (1987).[8]

This Court should grant certiorari because the Federal Circuit simply cannot ignore *Dow*, nor can its decision stand under the Fifth Amendment.

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[7] Judge Miller dismissed *Dow*'s holding as "primarily establishing when a taking occurs" (35a n.8), ignoring this Court's finding that the transfer of the claim was a voluntary assignment within the Claims Act's prohibition and that the Court "would not be justified in relaxing the rigor of the Act," *Dow*, 357 U.S. at 20.

[8] It is well established that "an attempted assignment of a claim against the United States does not forfeit the claim. It leaves the claim where it was before the purported assignment." *Colonial Navigation Co. v. United States*, 181 F. Supp. 237, 240 (Ct. Cl. 1960). As to the assigned claim, the assignor "is the party in interest, and the only party whose rights the Government is obliged to regard." *Id.*

II. This Court Should Grant Certiorari Because The Federal Circuit's Creation Of A Waiver Right Conflicts With The Plain Language Of The Claims Act And This Court's Claims Act Precedent

The Claims Act states plainly that "[a]n assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. § 3727(b) (42a). The decision below – holding that the "'Government's recognition and acceptance of such an assignment makes it a valid assignment'" (9a) – ignores the plain language of the statute and reads a waiver mechanism into the Claims Act, giving the Government unprecedented power to validate otherwise invalid assignments.

That is the very power this Court long ago concluded the Government does not have. In *McKnight v. United States*, 98 U.S. 179 (1878), the Court acknowledged that the Government's payment of part of a claim to an assignee *after allowance* was valid, but made it plain that the Government could not waive the Claims Act to permit assignment of the unascertained portion of the claim:

> An agreement to that effect, express or implied, looking to the future, would have been without validity. There could have been no consideration for it, and *no one had authority to make it*.

Id. at 186 (emphasis supplied). In short, under *McKnight*, the Government is without the waiver authority that the Federal Circuit wrongly concluded it has.[9]

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[9] Even if authorized, any waiver would not relieve the Government of its liability for the takings claim. *See First Eng-*

The effect of a waiver – allowing an assignee to bring a claim – is also contrary to the holdings of this Court under the Claims Act. In *United States v. Gillis*, 95 U.S. 407 (1877), this Court observed that because claims against the Government are not generally assignable at common law, there must be statutory authority for an assignment that would give the assignee the right to bring an action in his own name. *Id.* at 412-13. This Court recognized that Congress had not given "negotiability to claims against the government," and had instead enacted the Claims Act that "strikes down and denies any effect" to such assignments. *Id.* at 413-14. It concluded that "claims against the United States cannot be assigned so as to enable the assignee to bring suit in his own name in the Court of Claims." *Id.* at 417. Yet this is precisely what the Federal Circuit decision would enable PSEG to do. Moreover, the Federal Circuit decision is not saved by the practical fact that PSEG cannot recover on the claim, due to the Government's clever assertion that PSEG's claim is offset because it was the beneficiary of the diminished value (a fact the Federal Circuit never even mentioned).[10]

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lish, 482 U.S. at 321 ("[W]here the government's activities have already worked a taking of all use of property, *no subsequent action by the government* can relieve it of the duty to provide compensation for the period during which the taking was effective." (emphasis supplied)).

[10] The decision is also contrary to *Spofford v. Kirk*, 97 U.S. 484 (1878), because, while the Claims Act "incapacitates every claimant upon the government from creating an interest in the claim in any other than himself," *id.* at 488-89, the Federal Circuit gives PSEG an interest in ACE/Delmarva's takings claims. Likewise, it is contrary to *Nutt v. Knut*, 200 U.S. 12 (1906), because it allows a party that "was a stranger to the original

This Court's Claims Act holdings are still good law, and not, as the court below suggested (9a), "older Supreme Court cases" that may be swept aside. Focusing on the fact that the original Claims Act stated that all purported assignments "shall be absolutely null and void" (44a), while the present-day Claims Act (42a) does not contain that phrase (9a), the Federal Circuit completely ignored the legislative history of § 3727, which was one of many laws revised in 1982 "without substantive change" as part of a comprehensive codification of Title 31.[11] That history specifically disavows any intent to "impair the precedent value of earlier judicial decisions,"[12] such as *McKnight*, *Gillis*, *Spofford*, *Nutt*, and *Downie*.

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transaction to come between the claimant and the Government, prior to the allowance of a claim." *Id.* at 20. Finally, the decision is contrary to *National Bank of Commerce v. Downie*, 218 U.S. 345 (1910), because the ACE/Delmarva cases, like those in *Downie*, "are clean-cut cases of a voluntary transfer of claims against the United States, before their allowance, in direct opposition to the statute." *Id.* at 356.

[11] In the 1982 codification, the Claims Act was slightly rephrased and relocated from 31 U.S.C. § 203 (44a-47a) to 31 U.S.C. § 3727 (42a-44a). The language in § 203 at the time of the 1982 codification was similar to the original Claims Act language from the Act of February 26, 1853, 10 Stat. 170.

[12] *See* An Act to revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance as title 31, United States Code "Money and Finance," Pub. L. No. 97-258, 96 Stat. 877, 877, 976-77. The House Report explains: "[T]his bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions . . . . This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification law, however, the courts uphold the contrary presumption: the law

The critical fact is that, under both the original and the present-day Claims Acts, a voluntary assignment of a claim before its allowance is not valid.[13] The Federal Circuit recognized as much:

> On its face, this [Claims Act] language covers the assignments of the takings claims. The claims had not been allowed (indeed, the government contested them), their amount was undecided, and no warrant for their payment had been issued.

(6a.) The court then declared that "[t]he only basis upon which the assignments could be validated under the Act is if the government validly waived the application of the Act." (6a.)

Ignoring *McKnight* and without relying on a single Claims Act case (much less any case holding that the Government may waive the Claims Act), the Federal Circuit looked to decisions of its predecessor court under the Contracts Act that hold that the Government may recognize the assignment of a *con-*

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is intended to remain substantively unchanged." H.R. Rep. No. 97-651, at 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1897.

[13] Assignments may be valid after a claim has been allowed. *See* discussion of *McKnight*, *supra* p. 12; *see also Freedman's Sav. & Trust Co. v. Shepherd*, 127 U.S. 494, 505-06 (1888). Also, this Court has carved out an exception for assignments that occur "by operation of law" or under circumstances that are closely analogous. *See, e.g.*, *Erwin v. United States*, 97 U.S. 392, 397 (1878); *Goodman v. Niblack*, 102 U.S. 556, 560-61 (1881). The alleged assignments from ACE/Delmarva to PSEG could not be characterized as anything other than voluntary transfers outside these exceptions to the Claims Act.

tract.[14] On the ground that both statutes are for the protection of the Government and embody similar principles (8a),[15] the court concluded that there is "no valid reason why the government should not also be able to waive the [Claims] Act's prohibition in section 3727(a) against the assignment of claims." (8a.) In that one fell swoop, the court below gave to individual Government employees the ability to override a federal statute that Congress intended to be absolute, and to effectuate the transfer of an unliquidated claim, which this Court has repeatedly said is forbidden. The grossly simplistic reasoning employed by the Federal Circuit in support of this result ignores not only this Court's cases, but also critical differences between the Claims Act and the Contracts Act, as well as critical differences between the nature of a claim against, and a contract with, the Government.[16]

The language of the Claims Act is absolute regarding what is a valid assignment. The Contracts Act is different because it addresses the validity, not of the assignment itself, but rather of the assigned contract:

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[14] The court below cited *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980), and *Maffia v. United States*, 163 F. Supp. 859 (Ct. Cl. 1958). (6a-8a.)

[15] As the court below noted, the two separate statutory provisions constituting the Claims Act and the Contracts Act are commonly called the Anti-Assignment Act. (5a.) For this reason, courts on occasion lump the two together or confuse their distinct provisions.

[16] A contract *with* the Government, which reflects a mutual agreement, is not analogous to a claim *against* the Government, which often, especially in the context of a taking, evidences the absence of agreement. A contract "belongs" to both parties; a claim "belongs" to the party bringing it. A contracting party has an obligation to perform; a claimant has none.

> No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

41 U.S.C. § 15(a) (47a). Under the Contracts Act, the assignment of a contract may be valid, but the assigned contract may be annulled[17] so that the Government is not obliged to deal with a party other than the one with whom it chose to contract.[18] Because there is no reason that the Government may not subsequently choose to contract with a third party, such as the assignee, the Government may waive the annulling effect of the Contracts Act on the assigned contract.[19]

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[17] This contrasts sharply with the Claims Act, which invalidates the assignment, but not the claim. *See supra* note 8.

[18] *See Hobbs v. McLean*, 117 U.S. 567, 576 (1886) (The Claims Act and the Contracts Act "were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made."); *see also Francis ex rel. Myrick v. United States (Francis's Case)*, 11 Ct. Cl. 638, 640 (1875) ("The obvious reason for this enactment was to secure to the United States the personal attention and services of the contractor . . . .").

[19] This conclusion is reinforced by the Contracts Act provisions that (i) "cause the annulment of the contract . . . so far as the United States is concerned" and (ii) "reserve[ ] to the United States" "rights of action . . . for any breach of such contract." (47a.) These provisions, which suggest Government discretion, do not appear in the Claims Act.

The practical reasons for treating contracts under the Contracts Act differently from claims under the Claims Act were recognized early on. United States Attorney General Devens opined in 1877, and again in 1879, that the Government may, but is not compelled to, annul an assigned contract, observing that otherwise any party to a contract with the Government could walk away from it simply by assigning it. 15 Op. Att'y Gen. 235 (1877); 16 Op. Att'y Gen. 277 (1879). With respect to the Claims Act, Attorney General Devens opined that a power of attorney "had at no time a legal existence, so far as it affected the claim of the contractor" against the Government. 16 Op. Att'y Gen. 261, 262-63 (1879). Indeed, the contractor's claim was the "only one to be recognized by the United States." *Id.* at 263.

In light of the different characteristics of a claim and a contract, and the differing approaches of the Claims Act and the Contracts Act, it is not surprising, as the court below observed, that "none of [the Supreme Court] cases involved any question of, or decided whether the government could recognize as valid, an assignment of claims that otherwise would violate the statute." (9a.) First, the question was addressed and settled by the Attorney General roughly contemporaneously with the enactment of the Claims and Contracts Acts. Second, it would be nonsensical to apply the concept of Government recognition or consent to an assignment that, under the Claims Act and this Court's Claims Act decisions, is flatly invalid or null and void. Third, the Government has always utilized the Claims Act as a shield, to guard against an obligation to pay any party other than the original claimant. It has never to our knowledge used the statute as a sword to divest a claimant of its claim and to escape liability altogether.

This Court should close the "escape hatch" created by the Federal Circuit decision and affirm that the Claims Act may not be waived as to unallowed claims, and certainly not for the purpose of extinguishing takings claims. If it does not, the Government could wield this extraordinary power to deny just compensation whenever an owner whose property is taken transfers ownership of that property prior to litigating its takings claim. And that will not be infrequent, as neither takings claims nor property transfers are infrequent.[20] Takings claims will continue to arise in the contexts of flood controls, mining activities, dumping of spoil, and anti-degradation measures for wetlands, and more will be filed when "corridors" or "reservation areas" for transmission lines, wind farms, and geothermal drilling are designated. And, as an immediate matter, there are pending takings claims, like those in this case, for the Government's failure to remove SNF, that are worth hundreds of millions of dollars. Permitting the Government to waive the Claims Act transforms it from a statute designed to protect the Government from trafficking in claims against it by determining *which property owner* may bring a claim, to a statute empowering it to prevent *any property owner* from receiving just compensation for a taking –

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[20] Courts are frequently called upon to address the interplay of takings claims and property transfers. *See, e.g., Bailey v. United States*, 78 Fed. Cl. 239, 274-75 (2007) (original property owner has takings claims for denial of a permit for an access road due to wetlands protection); *Martin v. United States*, 30 Fed. Cl. 542, 551-52 (original property owner has takings claim for Federal easement for spoil disposal that restricted development of a marina on private property), *aff'd*, 41 F.3d 1519 (Fed. Cir. 1994).

a result that "vitiates" not only the Claims Act, but also the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Docket No. 2008-5010

DELMARVA POWER & LIGHT COMPANY
and ATLANTIC CITY ELECTRIC COMPANY,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee,

and

PSEG NUCLEAR, LLC and
PUBLIC SERVICE ELECTRIC and GAS CO.,
Defendant-Appellees.

Appeal from the United States Court of Federal Claims in Cases No. 04-0034C and 04-0036C, Judge Christine O.C. Miller

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DECIDED: September 18, 2008

Before: LINN, FRIEDMAN, and PROST, *Circuit Judges.*

FRIEDMAN, *Circuit Judge.*

The question in this appeal, which this court has not previously decided, is whether the United States may, in a particular case, waive the prohibition in the

Anti-Assignment Act, 31 U.S.C. § 3727 (2000), against the assignment of claims against the United States and thereby validate an assignment that that Act otherwise would prohibit. The Court of Federal Claims upheld the government's authority to do so, and we *affirm*.

I

A. This case arises out of the federal government's program, thus far unsuccessful, to remove and dispose of spent nuclear waste resulting from the operation of this country's nuclear electric generating facilities. The program is described in *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1337-39 (Fed. Cir. 2000). In brief, in 1983 the Department of Energy, pursuant to a statutory directive, entered into standard contracts with the country's nuclear electric generating companies, under which (1) the government agreed to begin accepting and disposing of spent nuclear waste by January 1, 1998 and (2) the utilities agreed to pay the government substantial amounts for its service, including both a one-time fee based on past nuclear generation of electricity and on-going fees.

The government was unable to inaugurate its waste disposal program and the utilities filed suits challenging that default. In *Maine Yankee*, this court held that the government had breached the standard contract by failure to commence the waste disposal program by the specified date and that the utilities could maintain breach-of-contract damage suits against the government for that default.

B. The appellees PSEG Nuclear and Public Service Electric and Gas Co. (collectively "PSEG") own and operate nuclear facilities. The appellants

Delmarva Power & Light Co. ("Delmarva") and Atlantic City Electric Co. ("Atlantic City") (collectively "the Assignors") are electric utilities that owned minority undivided interests in those nuclear plants. In September 1999, the Assignors by written contracts (the "Transfer Agreements") agreed to transfer to PSEG, in return for approximately $30 million, their interests in those nuclear plants. In the Transfer Agreements the Assignors also transferred to PSEG "[a]ll claims of Seller relating to or pertaining to the Department of Energy's defaults . . . including all claims for failure by the Department of Energy to take Spent Nuclear Fuel . . . ."

In January 2004, Delmarva and Atlantic City each filed a complaint in the Court of Federal Claims seeking damages from the United States for the Department of Energy's breach of its contracts to begin removal of the waste from PSEG's nuclear plants in which each had a minority interest. Although the original complaints alleged various theories of liability, in this appeal they rely only on their claim that the government's breach of contract constituted a taking of their former property interests in the nuclear plants, for which they are entitled to just compensation. The takings theory is that the government's breach of the removal contracts diminished the value of the nuclear plants, and as a result, they received less on the sale of their interest in those plants. The two cases have been consolidated.

When PSEG became aware of the claims the Assignors had asserted in this lawsuit, it invoked the arbitration clause of the Transfer Agreements to argue that the claims the Assignors had assigned in the Transfer Agreements included the taking claims. In proceedings to which the government was not a

party, the arbitrators sustained PSEG's contention. The Assignors challenged the arbitration decision in a New Jersey state court, which upheld the award.

The Assignors moved the Court of Federal Claims to vacate the arbitration award. The court then stated that the government should indicate whether it waived its rights under the Assignment-of-Claims Act. In response, the government filed a document which included the following statement:

> [T]he Government is exercising its sole discretion to accept the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case.

The Court of Federal Claims granted summary judgment for the government and dismissed the case. The court held that the government properly waived its right, under the Assignment of Claims Act, to invalidate the assignments; that the assignments included the takings claims; and that having assigned those claims to PSEG, the Assignors had no basis for asserting those claims in this case.

II

A. The language of the assignment clause of the Transfer Agreements on its face covers the takings claims, and the Assignors apparently do not contend otherwise. The Transfer Agreements included among the "Purchased Assets":

> All claims of Seller relating to or pertaining to the Department of Energy's defaults under the

> Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets, other than the claims described in Section 2.2(1) . . . .

This provision was followed by 13 separate "Excluded Assets" that were "hereby specifically excluded from the definition of Purchased Assets."

The takings claims were "claims . . . relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract" and "claims for failure by the Department of Energy to take Spent Nuclear Fuel." None of the exceptions in the "Excluded Assets" covered the takings claims. Since the assigned claims include the takings claims, the remaining issue is whether the Anti-Assignment Act barred those assignments, as the Assignors contend. In deciding that issue, we assume *arguendo*, but do not decide, (1) that parties other than the United States may challenge under the Anti-Assignment Act an assignment of claims against the government and (2) that the Assignors are not estopped from challenging their voluntary assignment of such claims.

B. As this court has noted, "[w]hat is commonly called the Anti-Assignment Act consists of two statutory provisions." *Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1349 (Fed. Cir. 2002). Under 41 U.S.C. § 15(a), which is not directly at issue in this case, "[n]o contract . . . or any interest therein, shall

be transferred by the party to whom such contract . . . is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned." This prohibition is inapplicable when the monies due from the United States are assigned to a "financing institution." The other provision, here at issue, 31 U.S.C. § 3727(a)(1), (b), provides that an

> assignment of any part of a claim against the United States Government or of an interest in the claim . . . may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued.

This provision contains a similar exception for assignment to a "financing institution" of money due under a contract. 31 U.S.C. § 3727(c).

"These two provisions together broadly prohibit . . . transfers of contracts involving the United States or interests therein, and assignment of claims against the United States." *Fireman's Fund*, 313 F.3d at 1349.

On its face, this language covers the assignments of the takings claims. The claims had not been allowed (indeed, the government contested them), their amount was undecided, and no warrant for their payment had been issued. The assignee of the claims was not a "financing institution," but a power company. The only basis upon which the assignments could be validated under the Act is if the government validly waived the application of the Act.

C. In *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980), our predecessor court, the Court of Claims, whose decisions are binding precedent here,

South Corp. v. United States 690 F.2d 1368, 1370 (Fed. Cir. 1982), held that the government validly waived the prohibitions against the assignment of government contracts in 41 U.S.C. § 15, *Tuftco*, 614 F.2d at 744. Although the case involved quite different facts, its analysis and reasoning are instructive and helpful in deciding the present case.

In *Tuftco*, parties to two government contracts to sell goods to the government assigned the contracts to Tuftco and its affiliate to perform them. Prior to the assignments, the original contractors informed the contracting officer about the proposed action, and the latter agreed to and recognized the assignments. The assignee performed the contracts. The government, however, paid a portion of the contract price to the original contractor rather than to the assignee. When the assignee sued the government for the amount it had not been paid, the government contended that the Anti-Assignment Act barred the suit.

The Court of Claims rejected the contention. It explained:

> [T]he contracting officer was fully aware of the assignments, recognized them, and communicated such recognition to plaintiff. In this case the action of defendant constituted a waiver of the Act's provisions, including the notice provision applicable to banks and financial institutions. Having chosen to recognize the assignments, defendant was bound to act in accordance with their terms.

Tuftco, 614 F.2d at 743-44.

The court noted "the long-recognized principle that 'Despite the bar of the Anti-Assignment statute (41 U.S.C. § 15), the Government, if it chooses to do

so, may recognize an assignment.'" *Id.* at 745 (citations omitted); *see Maffia v. United States*, 163 F. Supp. 859, 862 (Ct. Cl. 1958) ("Despite the bar of the [Assignment of Claims Act], the Government, if it chooses to do so, may recognize an assignment.").

The primary dispute in *Tuftco* was not whether "the Government may recognize an assignment"—the parties had "agreed" it may do so—but over "what actions by the Government will constitute recognition." *Id.* The Court of Claims held that "the Government was aware of, assented to, and recognized the assignments." *Id.* In the present case there is no question that if the government may recognize an otherwise invalid assignment of claims against it, the government's written "accept[ance]" of the claims filed in the Court of Federal Claims was a "recognition" of them.

We see no valid reason why the government should not also be able to waive the Anti-Assignment Act's prohibition in section 3727(a) against the assignment of claims. Both provisions of that statute "are for the protection of the Government." *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 371 (1949) (quoting *Martin v. Nat'l Sur. Co.*, 300 U.S. 588, 594 (1937)). Although the two provisions deal with different aspects of relationships and dealings with the government, they serve the common goal of protecting the government from similar problems that may arise from those relationships. "In general terms, however, the concerns of the two statutes and the legal concepts involved in their applicability are the same." *Tuftco*, 614 F.2d at 744, n. 4. As the Court of Federal Claims here stated, the two statutes "embody similar principles."

If, as in this case, the government concludes that it is appropriate and in its best interest to accept the assignment, it may do so. As the Court of Federal Claims here properly concluded, the "Government's recognition and acceptance of such an assignment makes it a valid assignment."

The Assignors rely upon older Supreme Court cases that describe assignments within the scope of the Anti-Assignment Act as "null and void" unless they complied with all of the statutory requirements, e.g., *National Bank of Commerce v. Downie*, 218 U.S. 345 (1910); *Nutt v. Knut*, 200 U.S. 13 (1906); and *McKnight v. United States*, 98 U.S. 179 (1878). At that time, however, the statute itself stated that such assignments were "null and void." The present statute does not so provide; instead, it merely specifies the conditions under which an assignment of a claim against the United States "may be made" and that "[a]n assignment under this subsection is valid for any purpose." Even more significantly, none of those cases involved any question of, or decided whether the government could recognize as valid, an assignment of claims that otherwise would violate the statute.

The Assignors also contend that the government should be judicially estopped here from arguing that the Anti-Assignment Act does not preclude the assignment because in *Rochester Gas & Electric Co. v. U.S.*, 65 Fed. Cl. 431 (2005), a parallel case, it argued that a similar claim assignment was invalid under that Act. In *Rochester Gas*, however (unlike the present case), the government had not waived the application of the Anti-Assignment Act to the particular claim assignment at issue. In the present case, as we have indicated, except for the waiver, the

assignment of the takings claims would violate the Anti-Assignment Act.

CONCLUSION

The judgment of the Court of Federal Claims granting summary judgment for the United States is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Dockets Nos. 04-34C & -36C

DELMARVA POWER & LIGHT CO.,
and ATLANTIC CITY ELECTRIC CO.,
Plaintiffs,

v.

UNITED STATES,
Defendant,

and

PSEG NUCLEAR, LLC, and
PUBLIC SERVICE ELECTRIC AND GAS CO.,
Limited purpose Intervenor-Defendants

FILED: November 13, 2007

MEMORANDUM OPINION AND ORDER

MILLER, Judge.

This matter is one of many that are pending in, and that have been before, the United States Court of Federal Claims involving contracts between the Department of Energy ("DOE") and commercial operators of nuclear power plants concerning the disposal of spent nuclear fuel ("SNF"). Both Delmarva Power & Light Co. ("Delmarva") and Atlantic City Electric Co. ("ACE") (collectively "plaintiffs") were owners, until September 27, 1999, of minority

interests in two commercially operated nuclear power plants: the Salem Nuclear Generation Station Units 1 and 2 ("Salem") and the Peach Bottom Atomic Power Station Units 2 and 3 ("Peach Bottom"). ACE was also an owner of a minority interest in a third nuclear plant, the Hope Creek Nuclear Generating Station ("Hope Creek"). In the instant action, plaintiffs assert three causes of action. First, plaintiffs allege that DOE has committed a partial breach of its contractual obligation to receive SNF. Secondly, plaintiffs allege that DOE breached the implied covenant of good faith and fair dealing by failing to accept SNF. Finally, plaintiffs allege that DOE's failure to meet its obligations under both the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10270 (2000) (the "NWPA"), and its contracts with plaintiffs forced plaintiffs to store SNF on their property, consequently reducing the value of their property and causing substantial economic harm that constituted a Fifth Amendment taking of property for which plaintiffs have received no just compensation.

Pending before the court are two separate motions. The first motion is plaintiffs' Motion To Vacate Arbitration Ruling filed July 2, 2007. PSEG Nuclear LLC and Public Service Electric and Gas Co. (collectively "PSEG") intervene as defendants in this case for the limited purpose of opposing this motion. The second motion is defendant's renewal of its motion to dismiss, originally filed May 12, 2004, or, in the alternative, its motion for summary judgment, originally filed April 28, 2005. These motions were renewed on September 12, 2007, upon inquiry by the court in its August 30, 2007 order requesting supplemental briefing concerning the Government's acceptance of plaintiffs' assignment of claims to the subsequent purchaser PSEG, which has intervened in these pro-

ceedings for the limited purpose of arguing its position on the issues addressed herein. Defendant's renewed motion for dismissal or, in the alternative, for summary judgment, addresses plaintiffs' amended complaints in both cases.

BACKGROUND[1]

Plaintiffs filed separate complaints on January 13, 2004, seeking relief solely on a takings theory. *Atl. City Elec. Co. v. United States*, No. 04-36C (Fed. Cl. filed Jan. 13, 2004); *Delmarva Power & Light Co. v. United States*, No. 04-34C (Fed. Cl. filed Jan. 13, 2004). Plaintiffs later amended their complaints to include damages based on a partial breach of contract. *Compare* Compl. filed Jan. 13, 2004, No. 04-34C, at ¶¶ 56-63, and Compl. filed Jan. 13, 2004, No. 04-36C (alleging only uncompensated taking) *with* Am. Compl. filed Dec. 2, 2004, No. 04-34C, at ¶¶ 76-91, and Am. Compl. filed Dec. 2, 2004, No. 04-36C (complaints with three counts including breach of contract, breach of implied covenant of good faith and fair dealing, and uncompensated taking). On January 21, 2005, *Atl. City Elec. Co.*, No. 04-36C, was consolidated with *Delmarva Power & Light* and assigned to the undersigned. Both Delmarva and ACE were owners of minority interests in Salem and Peach Bottom; Atlantic held an ownership interest in Hope Creek, as well. They sold these ownership interests to PSEG and PECO Energy Company

[1] The following background information is gleaned from plaintiffs' amended complaints and from the various briefs and exhibits accompanying the parties' motions over the last three years of litigation. This recitation of the background does not constitute findings of fact by the court.

("PECO")[2] by Purchase Agreements dated September 27, 1999. Plaintiffs seek damages, alleging that DOE's failure to dispose of SNF reduced the value of their property and caused plaintiffs to receive a diminished price when they sold their interests to PSEG and PECO.

DOE's failure to dispose of SNF has been the topic of several cases and generated a number of opinions before the Court of Federal Claims principally dealing with the type and amount of damages that can be awarded. *See, e.g.*, *Sys. Fuels, Inc. v. United States*, No. 03-2623C, 2007 WL 3033659 (Fed. Cl. Oct. 16, 2007); *S. Nuclear Operating Co. v. United States*, 77 Fed. Cl. 396 (2007); *Vt. Yankee Nuclear Power Co. v. United States*, 73 Fed. Cl. 236 (2006); *Rochester Gas and Elec. Co. v. United States*, 65 Fed. Cl. 431 (2005); *Boston Edison Co. v. United States*, 64 Fed. Cl. 167 (2005). The history of DOE's failure to dispose of SNF has been sufficiently chronicled in these and other cases. *See also Me. Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1337-39 (Fed. Cir. 2000).

Briefly restated, the relevant history began in 1982 when Congress acknowledged that the disposal of nuclear waste was a matter of nationwide concern implicating commercial, health, and national security concerns and enacted the NWPA. The NWPA authorized the Secretary of Energy to enter into contracts with utilities for the disposal of SNF and high-level radioactive waste. *See* 42 U.S.C. § 10222(a)(1). The Act effectively made entry into these contracts mandatory for the utilities by prohibiting the Nuclear

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[2] PECO later merged with Unicom, the owner of Commonwealth Edison, to become Exelon Generation Company ("Exelon").

Regulatory Commission from issuing licenses to any operator who has not "entered into a contract with the Secretary" or who "is [not] actively and in good faith negotiating with the Secretary for a contract." *Id.* § 10222(b)(1)(A). The NWPA required that all such contracts "shall provide that" DOE will dispose of the waste "beginning not later than January 31, 1998." *Id.* §10222(a)(5)(B). DOE drafted a Standard Contract for Disposal of Spent Nuclear Fuel and promulgated it through the rule-making process. 10 C.F.R. § 961.11 (the "Standard Contract") (1983). The Standard Contract required utilities to pay DOE fees, including a one-time fee and ongoing fees based on the amount of electricity generated, in exchange for SNF disposal service. As the Act required, the con-tract obligated DOE to take title to, transport, and dispose of the nuclear waste stored at the utilities' facilities beginning "not later than January 31, 1998." *Id.* at art. II. In 2000 the United States Court of Appeals for the Federal Circuit held that DOE's failure to take SNF by January 31, 1998, constituted a partial breach of the Standard Contract. *Maine Yankee*, 225 F.3d at 1343. In effect, DOE is liable for partial breach of every contract into which it has entered with every commercial operator of nuclear power plants in the United States. The various cases before the Court of Federal Claims generally are limited to determining the nature and extent of damages caused by DOE's partial breach.

PROCEDURAL HISTORY

Plaintiffs filed their complaints on January 13, 2004. On May 12, 2004, before the undersigned took *Atlantic City* from Judge George W. Miller, defendant moved to dismiss for failure to state a claim in *Delmarva Power & Light*, arguing that no cognizable

takings claim had been stated. In briefs supporting the motion to dismiss, defendant argued, *inter alia*, that plaintiffs' takings claims must fail because they were predicated upon a breach of contract with the Government. In responding, plaintiffs expressed some concern that defendant was challenging the validity of plaintiffs' assignments of their various rights to PSEG and PECO under the so-called Anti-Assignment Acts.[3] For these reasons on December 2, 2004, plaintiffs amended their complaints to include claims for partial breach of contract and breach of the implied covenant of good faith and fair dealing. Counsel for plaintiffs described this as a "protective matter." Transcript of Proceedings, *Atl. City Elec. Co. v. United States*, No. 04-36C, at 31 (Fed. Cl. Dec. 3, 2004) (G. Miller, J., presiding). With the filing of the amended complaint in *Delmarva Power & Light*, the court by order of December 3, 2004, deferred ruling on the motion to dismiss. On January 21, 2005, *Atl. City Elec. Co. v. United States*, No. 04-36C, was consolidated with *Delmarva Power & Light*. Its procedural history tracked that of *Delmarva Power & Light*.

Following consolidation, the court ordered defendant to file a renewed motion for summary judgment in both cases; defendant did so on April 28, 2005. After extensive briefing, the court determined that a

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[3] Two statutes, 41 U.S.C. § 15 (2000), and 31 U.S.C. § 3727 (2000), concern the assignment of contracts with the United States and claims against the United States, respectively. They often are referred to collectively as the "Anti-Assignment Acts" because they proscribe the voluntary assignment of contracts or claims against the United States other than pursuant to a statutorily established scheme. A fuller discussion of these statutes and their application to these cases appears in the discussion portion of this opinion. *See infra* part II.1.3).

more fully developed record would be required and on July 1, 2005, it denied defendant's motion for summary judgment without prejudice. Over the next year and one half, the parties engaged in discovery. Then, on January 5, 2007, defendant filed a motion to consolidate this action with *PSEG Nuclear L.L.C. and Pub. Serv. Elec. and Gas Co. v. United States*, No. 01-551C (Fed. Cl. filed Sept. 26, 2001), or, in the alternative, to issue a summons joining PSEG as a third-party defendant in the instant cases. PSEG currently owns and operates all three nuclear power plants involved in these cases. In its motion for consolidation, defendant argued that common issues of fact and of law required consolidation; defendant was concerned particularly with the specter of inconsistent or duplicative judgments. Def.'s Br. filed Jan. 5, 2007, at 6-13. On plaintiffs' motion, on January 18, 2007, the court stayed the discovery schedule pending resolution of that motion for consolidation.

The purchase agreements for the nuclear power plants between plaintiffs and PSEG provide for binding arbitration for "any dispute between [PSEG] and [plaintiffs] . . . relating to or arising out of any provision of" those purchase agreements. *See* Purchase Agreement by and Between Atlantic City Electric Company and PSEG Power LLC, Sept. 27, 1999, § 10.6 (filed in No. 04-34C on Aug. 23, 2007) (the "PAs").[4] Immediately after defendant's

[4] The several purchase agreements between Delmarva, ACE, and PSEG are almost identical. Their differences are slight and concern only the identification of which minority ownership interest in which plant is being conveyed. All of the substantive portions of the purchase agreements relevant to this matter are identical. For the sake of convenience, the purchase agreements will be referred to collectively as the "PAs."

January 5, 2007 motion to consolidate, PSEG sent plaintiffs a Notice of Dispute under the PAs. PSEG took the position that, through the purchase agreement, plaintiffs had assigned to PSEG and to Exelon whatever claims against DOE they might have had in connection to the purchased assets (the interest in the nuclear power plants and the associated SNF), regardless of the legal nature of those claims, *i.e.*, regardless of whether those claims arose under a theory of partial breach of contract or constituted takings without just compensation. Plaintiffs argued that PSEG's delay in seeking arbitration and conduct in the course of litigation constituted a waiver of PSEG's right to pursue arbitration. Following briefing, on March 27, 2007, the court issued an order to show cause to plaintiffs and defendant whether the court should grant a stay pending the resolution of the arbitration unless the arbitrators, in resolving the dispute, would consider plaintiffs' arguments concerning delay, laches, waiver, and/or estoppel. On April 5, 2007, PSEG served plaintiffs with an arbitration demand, pursuant to the Notice of Dispute. On April 12, 2007, the court stayed the cases for 90 days, *nunc pro tunc*, from March 6, 2007, to June 4, 2007, in order to allow for completion of the binding arbitration.

After demanding arbitration, PSEG sought a stay in its own case before Sr. Judge Bohdan A. Futey, *PSEG Nuclear L.L.C.*, No. 01-551C (Fed. Cl. filed Sept. 26, 2001). Copies of PSEG's briefs from that case were filed as appendices to defendant's briefs in this case relating to the motions pending before the stay. In the case before Sr. Judge Futey, PSEG had argued that such a stay was mandatory under Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3

(2000) ("FAA"), which requires stays where the court is "satisfied that the issue is referable to arbitration."

A strong federal policy favors arbitration, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and, under the FAA, trial courts generally are obligated to grant a stay where "'satisfied' that the issue involved in the case [is] referable to arbitration," *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372 (Fed. Cir. 2006). However, the United States is not a party to the arbitration agreements that formed the basis of PSEG's demand for dispute resolution and binding arbitration, which are contained in the PAs between PSEG and plaintiffs. Therefore, section 3 of the FAA did not apply in this case, and a stay was not absolutely mandated. *See, e.g. Adams v. Ga. Gulf Corp.*, 237 F.3d 538, 541-42 (5th Cir. 2001) ("The denial of the benefit of the mandatory stay provision to non-signatories has been grounded in the recognition that the non-signatory's litigation with an arbitrating party cannot be referred to arbitration"); *Nederlandse Erts-Tankersmaatschappij, N.F. v. Isbrandtsen Co.*, 339 F.2d 440, 441 (2d Cir. 1964) (granting of stay not justified under FAA where defendants are not parties to arbitration agreement).

As the United States Supreme Court has stated, the power to stay cases "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for the litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (citations omitted). Ultimately, neither plaintiffs nor defendant were able to

show cause as to why the action should not be stayed. The court's stay of the cases on April 12, 2007, issued because the arbitration between plaintiffs and PSEG appeared, in its judgment, likely to determine issues between the parties relevant to plaintiffs' pending litigation in the instant case, not because the FAA mandated a stay.

The binding arbitration continued, and the arbitral panel issued its opinion on June 20, 2007. *PSEG Power, LLC & PSEG Nuclear, LLC v. Pepco Holdings, Inc., Atl. City Elec. Co. & Delmarva Power & Light Co., Atl. City Electric Co. & Delmarva Power & Light Co. v. PSEG Power, LLC & PSEG Nuclear, LLC* (Arb. Jun. 20, 2007) (Mukasey, Loftus, & Aldock, Arbs.). The panel held that the issues were arbitrable, *id.* at 10; that PSEG did not waive its claims by delay, laches, waiver, or estoppel, *id.* at 10-17; and that plaintiffs assigned whatever takings claims they might have had to PSEG through the PAs. *Id.* at 17- 24. *But see id.* at 25-26 (separate opinion of John Aldock dissenting from majority, suggesting that PSEG forfeited its claim to arbitration through litigation conduct and laches, and that Court of Federal Claims should have decided such waiver issues). On June 22, 2007, PSEG filed its request with the Superior Court of New Jersey Chancery Division, Mercer County, to confirm the arbitration panel award. *PSEG Power, LLC & PSEG Nuclear, LLC v. Atl. City Elec. Co. & Delmarva Power & Light Co.*, No. C-59-07 (N.J. Super. Ct. Ch. Div. June 22, 2007).

On July 2, 2007, plaintiffs moved this court to vacate the arbitration ruling, alleging that the question of waiver was for the court to decide, not the arbitral panel, and again arguing that PSEG waived

its right to seek arbitration. Plaintiffs' argument relied primarily on the opinion of the United States Court of Appeals for the Third Circuit in *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007), issued on April 6, 2007, three months after PSEG's Notice of Dispute, one day after PSEG's arbitration demand, and just days before this court's April 12, 2007 order to show cause. On July 19, 2007, the court granted PSEG's motion to intervene in these cases for the limited purpose of opposing plaintiffs' motion to vacate the arbitration.

During argument on the motion and following briefing, the court asked defendant to take a position, for the record, with regard to the assignments of rights that plaintiffs provided to PSEG and to Exelon. On August 22, 2007, defendant filed a notice stating that the Government "accepted the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case." Def.'s Notice filed Aug. 22, 2007, at 3. Following defendant's express acceptance of the assignments in question, the court requested supplemental briefing with responses to the following six questions:

1. If the PAs transferred all extant claims as of September 27, 1999, were plaintiffs' takings claims in existence at the effective date of transfer?

2. What effect does defendant's notice formally accepting plaintiffs' assignment of claims to PSEG have on plaintiffs' maintenance of

a suit under a theory of retained takings claims?

3. Can an independent takings claim be maintained concurrently with a breach of contract claim pursuant to the Standard Contract? If not, how can a takings claim be maintained separately by bifurcating the claims through an assignment of the contract claims to a third-party?

4. If the court enters an order ruling that plaintiffs have no takings claims because the source of their claims was a viable contract at the time that the putative takings claim arose, *see Detroit Edison v. United States*, 56 Fed. Cl. 299, 302 (2003), can any takings claims survive?

5. If the source of the takings claims is independent from the Standard Contract and/or arises from a statute or regulation, *see Boston Edison*, 64 Fed. Cl. 167, 187 (2005), what precisely is that source? Can the source of the right be resolved as a matter of law? If such an independent source exists, on what date did each takings claim arise?

6. If the court cannot resolve plaintiffs' takings claims at this juncture, should plaintiffs's case be consolidated with PSEG's earlier-filed case? *See Vt. Yankee Nuclear Power Corp. v. United States*, 73 Fed. Cl. 236, 242 (2006).

Order entered Aug. 30, 2007. The court also asked defendant to "state for the record whether it renews its motion to dismiss filed May 12, 2004, for purposes

of the court's final ruling." *Id.* at 5. In its response dated September 12, 2007, defendant did so, renewing with respect to both cases its motion to dismiss or, in the alternative, its motion for summary judgment, originally filed April 28, 2005, as supplemented by subsequent briefing.

DISCUSSION

I. The motion to vacate the arbitration ruling

1. Determining waiver in an arbitration context and plaintiff's assertion of Ehleiter

A strong presumption favors finding a matter to be arbitrable. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the Supreme Court examined the role of judges in resolving issues related to arbitration. The Court held that gateway questions of arbitrability are presumptively for the court to decide. These gateway questions, however, are limited to disputes that the "contracting parties would likely have expected a court to have decided . . . where they are not likely to have thought that they had agreed that an arbitrator would do so," *id.* at 83-84, which is to say, "whether the parties are bound by a given arbitration clause" and whether such a clause "applies to a particular type of controversy." *Id.* By contrast, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide." *Id.* at 84. These procedural questions include traditional allegations of "waiver, delay, or a like defense to arbitrability." *Id.* The Supreme Court affirmed this division of labor between the courts and arbitrators in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

In *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007), however, the Third Circuit observed that it had "long decided questions of waiver *based on litigation conduct* instead of referring the issue to an arbitrator." *Id.* at 217 (emphasis added). The Third Circuit, in recounting the only other post-*Howsam* and *Green Tree* case in which a federal court of appeals considered this division of labor between the courts and arbitrators, noted that the language of the FAA only required courts to issue a stay in an action pending arbitration if "'the applicant for the stay is not in *default* in proceeding with such arbitration.'" *Ehleiter*, 482 F.3d at 218 (quoting 9 U.S.C. § 3). The Third Circuit understood this to be a statutory mandate that, at least "in cases where a stay is sought," courts should themselves "decide the waiver issue" presented by litigation conduct. *Id.* The court also considered "comparative expertise considerations" informing the Supreme Court's resolution of who should decide issues of waiver by litigation conduct. *Id.* Litigation conduct necessarily implicates "judicial procedures," and the Third Circuit recognized that courts, not arbitrators, are best situated to determine whether litigative conduct constitutes an abuse of judicial proceedings. *Id.* For that reason the court in *Ehleiter* held emphatically that "waiver of the right to arbitrate based on litigation conduct remains presumptively an issue for the court to decide." *Id.* at 221.

Plaintiffs argue in their motion to vacate the arbitration proceeding that this court, not the arbitral panel, should have decided whether PSEG waived its right to seek arbitration under the PAs. Plaintiffs note that PSEG's "arbitration demand came 40 months after Plaintiffs' representatives met with PSEG's representatives in September 2003 to discuss Plaintiffs'

intention to file takings claims against DOE" and "22 months after" plaintiffs filed suit in the instant action. Pls.' Br. filed Jul. 2, 2007 at 11. Further, plaintiffs charge that PSEG was "not only aware of, but actively participated in, this litigation" by opposing a motion to compel production of certain documents, by later producing those documents and presenting witnesses at depositions, and responding to the court's March 27, 2007 order to show cause. *Id.* at 12.

It is important to note that plaintiffs do not assert that the court should vacate the arbitration ruling under the terms of the FAA. Under the FAA district courts may vacate an arbitration award where one of the following is present: (1) fraud in procuring the award; (2) partiality on the part of the arbitrators; (3) gross misconduct by the arbitrators; or (4) failure of the arbitrators to render a mutual, final, and definite decision. 9 U.S.C. § 10; *see Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1365, 1367 (Fed. Cir. 2001). Plaintiffs do not contend that any of these four grounds is applicable. Instead, plaintiffs base their objection on *Ehleiter*'s holding that, in the circumstances presented by the cases at bar, the court, not the arbitral panel, should have decided whether PSEG's litigation conduct constituted a waiver of its right to seek arbitration and contend that PSEG's conduct so constituted a waiver. Plaintiffs' understanding of the reasoning employed by the Third Circuit in *Ehleiter* is substantially correct: when two parties have engaged in litigation before a particular court, that court is best situated to resolve the question of waiver by litigation conduct, because such a question necessarily involves understanding the conduct that has been before the court and implicates judicial procedures. Unfortunately for plaintiffs, while

the reasoning in *Ehleiter* is sound, it does not apply to the facts of this case.

It is important to note that the "comparative expertise considerations" that militate having a court and not the arbitrators decide questions of waiver of arbitrability by litigation conduct that the court in *Ehleiter* discussed assume a situation in which the two litigants have been engaging in litigative conduct before the court on an ongoing and involved basis as opposing parties to the dispute. Plaintiffs filed suit against the United States as a defendant, not PSEG. Any consideration of a court's "comparative expertise" is necessarily limited to its percipient understanding of the litigative conduct as between the parties to the litigation that occurred in motions and arguments before the court. These cases have not been consolidated with the earlier case of *PSEG Nuclear L.L.C.*, No. 01-551C (Fed. Cl. filed Sept. 26, 2001), which is currently pending before Sr. Judge Futey. Nor has PSEG been allowed to intervene generally; it is an intervenor-defendant only for the purposes of this motion to vacate the arbitration ruling. Plaintiffs take the position that PSEG became an active litigant in these cases by opposing a motion to compel production of certain documents, by later producing those documents and presenting witnesses at depositions, and by responding to the court's March 27, 2007 order to show cause. Pls.' Br. filed July 2, 2007, at 12. To characterize such actions as voluntary and ongoing involvement in this dispute between plaintiffs and defendant is strained. Instead, these actions are responsive in nature and do not represent an attempt by PSEG to appear before the court as a litigative forum in the context of this particular controversy between plaintiffs and the

Government.[5] Ultimately, however, the court must deny plaintiffs' motion to vacate the arbitration ruling because the court lacks jurisdiction over disputes between private parties.

2. Whether the United States Court of Federal Claims has jurisdiction over private arbitration between plaintiffs and PSEG

The Court of Federal Claims, like all federal courts, is a court of limited jurisdiction. The court's jurisdiction is set forth primarily in the Tucker Act, codified as 28 U.S.C. § 1491. It grants the court "jurisdiction to render judgment upon *any claim against the United States* founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2000) (emphasis added). This grant of jurisdiction constitutes a waiver of sovereign immunity by the United States. "It long has been established, of course, that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (alteration in original) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Thus, the Court of Federal Claims

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[5] The arbitral panel's majority opinion describes PSEG's conduct in a similar manner. *See PSEG Power, LLC & PSEG Nuclear, LLC v. Pepco Holdings, Inc., Atlantic City Elec. Co. & Delmarva Power & Light Co., Atlantic City Electric Co. & Delmarva Power & Light Co. v. PSEG Power, LLC & PSEG Nuclear, LLC*, at 13-17 (Arb. Jun. 20, 2007) (Mukasey, Loftus, & Aldock, Arbs.).

has no jurisdiction over a cause of action except to the extent that Congress has waived sovereign immunity. *Id.* Moreover, "in a Court of Claims context, . . . a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Id.* (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Given this construction, the jurisdiction of the Court of Federal Claims extends as far, but only as far, as the United States has consented to suits against it. "The jurisdiction of the Court of Federal Claims is prescribed by the metes and bounds of the United States' consent to be sued in its waiver of immunity." *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461 (Fed. Cir. 1998).

The Court of Federal Claims and its predecessor courts have never possessed jurisdiction to adjudicate disputes between private parties. *See Sherwood*, 312 U.S. at 588-89 ("We think it plain that the present suit could not have been maintained in the Court of Claims because the court is without jurisdiction of any suit brought against private parties . . . ."); *see also Nat. City Bank of Evansville v. United States*, 143 Ct. Cl. 154, 163 F. Supp. 846, 852 (1958) ("It is well established that the jurisdiction of this court extends only to claims against the United States, and obviously a controversy between private parties could not be entertained."). The Court of Federal Claims was established to provide a forum for the vindication of public rights, *i.e.*, to provide a mechanism for holding government accountable to suits by private citizens. The court lacks jurisdiction over private rights implicated in a dispute between private parties. *See Fisherman's Harvest, Inc. v. PBS&J*, 490 F.3d 1371, 1376-78 (Fed. Cir. 2007).

The arbitration ruling in question is the product of private agreements between plaintiffs and PSEG. The genesis of the right to arbitrate lies in the PAs between private parties, not any agreement involving the Government or implicating the sovereign. Regardless of the merits of plaintiffs' argument that PSEG's conduct – whether in the course of litigation or otherwise – constitutes a waiver of its right to seek arbitration, this court does not possess the power to disturb an arbitration created by an agreement between private parties and involving only those private parties. For this reason plaintiffs' motion to vacate the arbitration ruling is denied.

II. Defendant's renewed motion for summary judgment

In its order entered on August 30, 2007, the court asked defendant to "state for the record whether it renews its motion to dismiss filed May 12, 2004, for purposes of the court's final ruling." Order entered Aug. 30, 2007, at 5. In its response dated September 12, 2007, defendant did so, renewing for both cases its motion to dismiss or, in the alternative, its motion for summary judgment, originally filed April 28, 2005, as supplemented by subsequent briefing. Defendant's original May 12, 2004 motion to dismiss in *Delmarva Power & Light*, filed pursuant to RCFC 12(b)(6), alleged that plaintiffs failed to state a claim for which relief could be granted. Broadly speaking, in that motion to dismiss, defendant argued that plaintiffs did not identify any cognizable claim for a taking of any property.[6] Defendant's original April 28,

[6] Defendant's May 12, 2004 motion to dismiss was in response to plaintiffs' original complaints. The original complaints included only takings claims; the so-called "protective" claims for partial breach of contract and breach of the implied covenant of

2005 motion for summary judgment, pursuant to RCFC 56, argued: that plaintiffs purported to assign all of their claims through the PAs, whether those claims arose under a takings or a contracts theory; that, in any event, plaintiffs' requests for diminished value and restitution damages were not proper remedies under a contract claim; that plaintiffs had not identified a cognizable claim for a taking of property; and, that plaintiffs' payment of fees to the SNF fund did not constitute a taking.

1. Standard of review

1) Summary judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RCFC 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The legal issues before the court may be resolved on summary judgment. *Long Island Sav. Bank, FSB v. United States*, No. 2006-5029, ___ F.3d ____, 2007 WL 2685640, at *7 (Fed. Cir. Sept. 13, 2007).

2) Takings claims and cognizable property interests

The Federal Circuit has held that determining "[w]hether a compensable taking has occurred is a question of law based on factual underpinnings." *Members of Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1329 (Fed. Cir. 2005);

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good faith and fair dealing were raised by plaintiffs only in their amended complaints.

see Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001). In evaluating whether a governmental action effects a taking of private property without just compensation, the court must first determine whether the claimant has established a cognizable property interest, *i.e.*, one protected by the Fifth Amendment. *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002). If a property right has been established, the court then must determine whether the Government has taken it in part or in whole. The traditional concept of a taking posits a physical appropriation or physical invasion of private property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). The Supreme Court nonetheless long has accepted that a taking can occur when the Government regulates use of property, even in the absence of a physical taking or invasion. Regulatory takings jurisprudence recognizes that if "a regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

3) Assignments of contracts with and claims against the Government

Two statutes apply to restrict the manner in which contracts with the Government and claims against the Government can be assigned voluntarily: 41 U.S.C. § 15 and 31 U.S.C. § 3727 (2000).[7] They are often referred to as the "Assignment of Claims Act" or the

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[7] The second of these statutes was formerly codified at 31 U.S.C. § 203. In 1982 title 31 of the U.S. Code was substantially reorganized. Pub. L. No. 97-258, 96 Stat 877 (1982). This statute was recodified at 31 U.S.C. § 3727 without substantive change. *See id.* The recitation of case law that follows in this section involves cases adjudicated before 1982, so those courts referred to 31 U.S.C. § 203, not § 3727.

"Anti-Assignment Act," collectively. *See United Bonding Ins. Co. v. Catalytic Constr. Co.*, 533 F.2d 469, 471 (9th Cir. 1976) ("The Assignment of Claims Act . . . provides that . . . ."). The relevant portion of the first of these statutes, 41 U.S.C. § 15, reads:

> No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

41 U.S.C. § 15(a) (2000). This statute serves to restrict generally the assignment of any interest in a contract with the United States to any other party, with a few exceptions pertaining largely to the assignment of moneys due under a contract with the United States to a bank or similar financial institution. *See* 41 U.S.C. § 15(b). Any purported assignment of a contract with the United States not only is invalid, but it causes the annulment of the contract "so far as the United States is concerned." 41 U.S.C. § 15(a).

The second statute, 31 U.S.C. § 3727, applies more generally to "a claim against the United States . . . ." 31 U.S.C. § 3727(a)(1) (2000). The relevant portion of the statute restricts generally the assignment of claims against the United States outside of a restricted procedure.

> An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been

> issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. The person making the assignment shall acknowledge it before an official who may acknowledge a deed, and the official shall certify the assignment. The certificate shall state that the official completely explained the assignment when it was acknowledged. An assignment under this subsection is valid for any purpose.

31 U.S.C. § 3727(b). The statute thus establishes that assignments of claims against the Government are void unless they comply with the restrictions of 31 U.S.C. § 3727(b). By the terms of the statute, claims that have not yet been pursued in court to final judgment necessarily are precluded from assignment. The two statutes often are referred to collectively because together they serve to preclude generally the voluntary assignment of legal rights as against the Government to third parties and because they embody similar principles. It is helpful, however, to understand the "conceptual difference between the statutes," which is that 31 U.S.C. § 3727 "pertains to claims for work already done," while 41 U.S.C. § 15, "involving executory contracts, is more concerned with continuing obligations." *Tuftco Corp. v. United States*, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980). This explains why assignments of claims are void *ab initio* pursuant to 31 U.S.C. § 3727, but, pursuant to 41 U.S.C. § 15, assignments of executory contracts are both void and annul the contract and its concomitant obligations "so far as the United States is concerned." 41 U.S.C. § 15(a).

The Supreme Court has held on more than one occasion that "primary purpose" of these statutes "was undoubtedly to prevent persons of influence

from buying up claims against the United States, which might then be improperly urged upon officers of the Government." *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 373 (1949). Two other important goals of the Assignment of Claims Act were

> (1) to insure that the United States may avoid involvement in any litigation as to the existence or extent of subrogation or other assignment of such claims; and (2) to insure that the suits and any judgments against the United States will be in the names of the original claimants so that the United States will be able to avail itself of its statutory rights in respect of venue, and of counterclaim and offset on account of any cross-claims it may have against the original claimants.

Id. at 371; *see e.g., United States v. Shannon*, 342 U.S. 288, 283 (1952) (noting similar purpose for enactment). The Government is the only party that can properly invoke the Assignment of Claims Act, because "provisions of the statute making void an assignment or power of attorney by a Government contractor *are for the protection of the Government*." *Aetna*, 338 U.S. at 371 (emphasis added). Because the general prohibition on assignment of contracts and claims is intended for the protection of the Government, courts also have held that the Government may, by word or deed, recognize and accept an assignment, even where such an assignment otherwise did not comply with the terms of the Assignment of Claims Act. *See, e.g., Tuftco Corp. v. United States*, 614 F.2d 740, 746 (Ct. Cl. 1980) ("Consistent with the situations in which [the Act] has been deemed inapplicable stands the long-recognized principle that . . . the Government, if it chooses to do so, may recognize an assignment."); *United Pac. Ins. Co. v.*

United States, 358 F.2d 966, 970 (Ct. Cl. 1966) ("[D]efendant has now withdrawn any objection it might have had to the validity of the assignment. . . . In the absence of any attack upon the assignment by defendant, we feel bound, following the dictates of equitable policy and sound precedent, to recognize the assignment and treat it as valid and binding between the parties.").[8]

2. Plaintiffs assigned all claims with respect to and arising out of the SNF to PSEG

Defendant and PSEG contend that plaintiffs cannot assert their takings and contracts claims, whatever the merits of those claims, because plaintiffs assigned whatever claims they had regarding DOE's failure to dispose of SNF to the buyers of the nuclear plants, PSEG and PECO (now Exelon), by the terms of the PAs. Plaintiffs respond that the assignments of their contract claims were invalid *ab initio* by operation of the Assignment of Claims Act and, as a consequence, that they retain the right to pursue their claims against the Government. Plaintiffs also contend that the language of the PAs did not include an assignment of their takings claims. In the alternative, plaintiffs posit that, in any case, the

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[8] Plaintiffs have asserted that takings claims may never be assigned. *See* Pls.' Br. filed Sep. 12, 2007, at 14-16. They rely primarily on misreadings of the relevant Supreme Court precedent. *Shannon* stood only for the principle that an otherwise unrecognized voluntary assignment of claims remains invalid, even when the assignor joins as a party the assignee. *Shannon*, 342 U.S. at 284-85. Plaintiffs' contend that *United States v. Dow*, 357 U.S. 17 (1958), also stands for the proposition that the assignment of takings claims is prohibited as a general proposition. The holding in *Dow* concerned primarily establishing when a taking occurs, not whether the assignment of takings claims is permissible. *Id.* at 20-23.

Assignment of Claims Act precludes the assignment of their takings claims and that any such purported assignment would be invalid *ab initio*.

1) The Government's acceptance of the assignments

The Assignment of Claims Act operates for the benefit of the Government; its provisions are intended to protect the Government from voluntary assignments of contracts or claims to parties where it has not consented to or recognized the assignment. The Government's recognition and acceptance of such an assignment makes it a valid assignment. *See supra* Part II.1.3); *see also Maffia v. United States*, 163 F. Supp. 859, 862 (Ct. Cl. 1958) ("Despite the bar of the [Assignment of Claims Act], the Government, if it chooses to do so, may recognize an assignment."). During argument on the motion to vacate and following briefing, the court asked defendant to take a position, for the record, with regard to the assignments of rights that plaintiffs provided to PSEG and to Exelon. On August 22, 2007, defendant filed a notice "exercising its sole discretion to accept the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case." Def.'s Notice filed Aug. 22, 2007, at 3. This express acceptance of the assignments serves to vitiate the provisions of the Assignment of Claims Act that otherwise would preclude the assignment of contracts with, or claims against, the United States. For this reason all assign-

ments of such contracts and claims that plaintiffs made in the PAs are valid.[9]

2) The subject matter assigned in the PAs

Section 2.1 of the PAs described those assets that the sellers (plaintiffs) would transfer to purchasers (PSEG and PECO) in the course of the sale of the nuclear plants. Determining what purportedly was assigned by plaintiffs in the PAs requires interpreting the relevant provisions of the PAs. Contract interpretation "begins with the plain language of the written agreement." *Hercules, Inc. v. United States*, 292 F.3d 1378, 1380-81 (Fed.Cir.2002); *see also Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1543 (Fed.Cir.1993) ("A contract is read in accordance with its express terms and the plain meaning thereof.").

Subsection 2.1(*l*), the relevant portion of the PAs, includes as one of the "Purchased Assets"

> All claims of Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Pur-

[9] This notice accepting assignments resolves any previous ambiguity or inconsistency in the Government's position on the validity of these assignments.

> chased Assets, other than the claims described in Section 2.2(*l*) . . . .[10]

PAs § 2.1(*l*). No dispute can be marshaled that the plain language of this provision expressly assigns the right to pursue breach of contract claims against DOE for its failure to take SNF.[11]

Plaintiffs nonetheless assert that "[t]here is no reasonable interpretation that Plaintiffs' takings claims are in any way included within the scope of this section . . . . Plaintiffs' takings claims are not based on the Standard Contract and do not emanate from that Contract. Rather, Plaintiffs' takings claims are based on its rights under the U.S. Constitution and are separate and apart from the Standard Contract with DOE." Pls.' Br. filed Sept. 12, 2007, at 5. Indeed, plaintiffs take pains to note:

> The three PAs are each approximately eighty-three pages long, single spaced, before including exhibits, attachments, and schedules. The par-

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[10] Section 2.2(*l*) excludes from the Purchased Assets only certain "Department of Energy Decommissioning and Decontamination Fees" that are not the subject of this dispute.

[11] Plaintiffs have admitted that they raised the claims for partial breach of contract in their amended complaints as a "protective" measure, after expressing concern that the Government would take inconsistent positions as to its acceptance of the assignment of the Standard Contract and any rights to pursue an action for partial breach of the Standard Contract. Transcript of Proceedings, *Atl. City Elec. Co. v. United States*, No. 04-36C, at 31 (Fed. Cl. Dec. 3, 2004). Plaintiffs have also admitted, in their opposition to defendant's original motion for summary judgment of April 28, 2005, that, "[t]o the extent that the government is willing to [accept the transfer of the relevant breach of contract claims], Delmarva and Atlantic would be willing to dismiss the breach claims in the amended complaints." Pls.' Br. filed May 25, 2005, at 9.

> ties expressly retained sophisticated counsel to advise them and to draft these extremely detailed documents. There is no claim by any party to these proceedings that these PAs are in any way ambiguous on these issues or require the use of parol evidence to make sense of them. Yet, nowhere in these PAs do the parties express any intent or desire to transfer claims grounded on the U.S. Constitution or arising under the Constitution. Had the parties desired to do so, it would have been a relatively easy matter to include a separate clause providing that all Plaintiffs' claims arising under or grounded on the U.S. Constitution were transferred to PSEG and/or that those claims were no longer the property of Plaintiffs.

Id. Plaintiffs' contentions, however, do not flow from the plain language of the written agreement. Section 2.1(*l*) of the PAs transferred to buyers not only "[a]ll claims of Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract," but also "*all other claims* of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets . . ." PAs § 2.1(*l*) (emphasis added). The SNF was one of these Purchased Assets, *see* PAs §§ 2.1(b)-2.1(d), and plaintiffs' takings claims, whatever their merits, are "claims of the Seller against the Department of Energy with respect to, arising out of, or in connection with" that SNF.[12]

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[12] Because plaintiffs have assigned all their claims related to the SNF to PSEG and PECO, including whatever takings claims they might have otherwise pursued, the court declines to comment on the merits of such takings claims.

3) No genuine issue of material fact

Summary judgment is appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RCFC 56(c); *see also Anderson*, 477 U.S. at 247-48. It is particularly important to note that a "critical factor in a motion for summary judgment" is "the determination by the court that there is no *genuine* issue of *material* fact." *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835 (Fed. Cir. 1984). Attorney argument asserting a genuine issue of material fact is insufficient to oppose successfully a motion for summary judgment. "The party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient." *Id.* at 836. Plaintiffs have failed to point to any such evidentiary conflict at all; the only disputed issues before the court are matters of law. Because plaintiffs assigned all of their claims against the Government pertaining to disposal of the SNF to PSEG and PECO, the court must grant defendant's motion for summary judgment.

CONCLUSION

Accordingly, based on the foregoing, defendant's motion for summary judgment is granted, and the Clerk of the Court shall enter judgment for defendant.

IT IS SO ORDERED.

No costs.

s/ Christine O.C. Miller

Christine Odell Cook Miller
Judge

APPENDIX C

The Constitution of the United States

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX D

31 U.S.C. § 3727 (2008). Assignments of claims

(a) In this section, "assignment" means—

(1) a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim; or

(2) the authorization to receive payment for any part of the claim.

(b) An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. The person making the assignment shall acknowledge it before an official who may acknowledge a deed, and the official shall certify the assignment. The certificate shall state that the official completely explained the assignment when it was acknowledged. An assignment under this subsection is valid for any purpose.

(c) Subsection (b) of this section does not apply to an assignment to a financing institution of money due or to become due under a contract providing for payments totaling at least $ 1,000 when—

(1) the contract does not forbid an assignment;

(2) unless the contract expressly provides otherwise, the assignment—

(A) is for the entire amount not already paid;

(B) is made to only one party, except that it may be made to a party as agent or trustee for more than one party participating in the financing; and

(C) may not be reassigned; and

(3) the assignee files a written notice of the assignment and a copy of the assignment with the contracting official or the head of the agency, the surety on a bond on the contract, and any disbursing official for the contract.

(d) During a war or national emergency proclaimed by the President or declared by law and ended by proclamation or law, a contract with the Department of Defense, the General Services Administration, the Department of Energy (when carrying out duties and powers formerly carried out by the Atomic Energy Commission), or other agency the President designates may provide, or may be changed without consideration to provide, that a future payment under the contract to an assignee is not subject to reduction or setoff. A payment subsequently due under the contract (even after the war or emergency is ended) shall be paid to the assignee without a reduction or setoff for liability of the assignor—

(1) to the Government independent of the contract; or

(2) because of renegotiation, fine, penalty (except an amount that may be collected or withheld under, or because the assignor does not comply with, the contract), taxes, social security contributions, or withholding or failing to withhold taxes or social security contributions, arising from, or independent of, the contract.

(e)(1) An assignee under this section does not have to make restitution of, refund, or repay the amount received because of the liability of the assignor to the Government that arises from or is independent of the contract.

(2) The Government may not collect or reclaim money paid to a person receiving an amount under an assignment or allotment of pay or allowances authorized by law when liability may exist because of the death of the person making the assignment or allotment.

* * * * *

31 U.S.C. § 203 (1976). Assignments of claims; set-off against assignee [predecessor to 31 U.S.C. § 3727]

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided,*

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursu-

ant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or setoff for any liability of any nature of the assignor to the United States or any department or agency thereof which arises inde-

pendently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or non-withholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued.

* * * * *

41 U.S.C. § 15 (2008). Transfers of contracts; assignments; assignee not subject to reduction or setoff

(a) Transfer. No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

(b) Assignment. The provisions of subsection (a) shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency, provided:

(1) That, in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment.

(2) That, unless otherwise expressly permitted by such contract, any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.

(3) That, in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of the assignment with—

(A) the contracting officer or the head of his department or agency;

(B) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and

(C) the disbursing officer, if any, designated in such contract to make payment.

(c) Validity of assignment. Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section shall constitute a valid assignment for all purposes.

(d) Assignee liability. In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to

make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

(e) Amendment of contract. Any contract of the Department of Defense, the General Services Administration, the Department of Energy, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, upon a determination of need by the President, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff. Each such determination of need shall be published in the Federal Register.

(f) Assignor liability arising independent of contract. If a provision described in subsection (e) or a provision to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of—

(1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract;

(2) fines;

(3) penalties (which term does not include amounts which may be collected or withheld from the assignor

in accordance with or for failure to comply with the terms of the contract); or

(4) taxes, social security contributions, or the withholding or non withholding of taxes or social security contributions, whether arising from or independently of such contract.

(g) Accrued rights and obligations. Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued.

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DELMARVA POWER & LIGHT COMPANY, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	) No.04-0034C, into) which has been) consolidated No.) 04-0036C (Judge) Christine Miller))

DEFENDANT'S NOTICE REGARDING THE ASSIGNMENT OF PLAINTIFFS' CLAIMS, IN RESPONSE TO THE COURT'S INQUIRIES DURING THE PARTIES' HEARING ON AUGUST 22, 2007

In response to the Court's inquiry at today's hearing, defendant, the United States, clarifies its position with regard to the assignments of rights that the plaintiffs provided to PSEG Nuclear, LLC ("PSEG Nuclear"), and Exelon Generation Company ("Exelon").

As an initial matter, as we previously explained in prior briefing, it is clear that the Assignment of Claims Act was enacted for the protection of the Government, *see In re Ideal Mercantile Corp.*, 244 F.2d 828, 832 (2d Cir. 1957), *United States v. Shannon*, 342 U.S. 288, 291-92 (1955), and that only the Government may assert its protections. *See Martin v. National Surety Co.*, 300 U.S. 588, 594-95 (1937); *McKenzie v. Irving Trust Co.*, 323 U.S. 365 (1945). Because the Assignment of Claims Act works exclusively for the Government's protection, it is well-established that the Government may waive those

protections or otherwise recognize an assignment. *Tuftco Corp. v. United States,* 222 Ct. Cl. 277, 614 F.2d 740, 745 (1980); *see Vermont Yankee Nuclear Power Corp. v. United States,* 73 Fed. Cl. 236, 241 (2006) ("an assignment of claims is permissible where the assignment occurs by operation of law, or where the government chooses to 'recognize' the assignment of a claim"); *Riviera Fin. of Texas, Inc. v. United States,* 58 Fed. Cl. 528, 530 (2003) ("It is well established in the case law of this circuit that the Government can waive coverage of the Anti-Assignment Acts, as the Government concedes in this case"); *Maffia v. United States,* 143 Ct. Cl. 198, 163 F. Supp. 859, 862 (1958) ("the Government, if it chooses to do so, may recognize an assignment") (cited in *Riviera Fin.*, 58 Fed. Cl. at 530).

As we previously explained in our response to the plaintiffs' motion to vacate the arbitration decision, which we filed on July 19, 2007, the United States Supreme Court has tied the prohibition against the assignment of takings claims to the Assignment of Claims Act. *United States v. Dow,* 357 U.S. 17, 20 (1958). The plaintiffs have identified no valid reason that the same rule regarding waiver of the Assignment of Claims Act as they apply to contract claims is somehow different as they apply to takings claims.

With regard to the plaintiffs' assignments to Exelon at issue in this case, the Court is aware that we previously settled our disputes with Exelon amicably. Through that settlement, the Government understood that it was resolving all claims arising under the Standard Contracts to which Exelon was a party or had an interest and that all litigation relating to those contracts would be at an end, a settlement that

also included Exelon's takings claims against the Government. As part of that settlement, the Government fully understood that it included any and all assignments that Exelon had received associated with its Standard Contracts and/or relating to its nuclear reactors, as well as all claims associated with rights relating to those reactors. As a result, the Government accepted the assignments that the plaintiffs provided to Exelon, and they were incorporated into the settlement agreement between Exelon and the Government, extinguishing those claims. Given that the United States resolved all assignments associated with the Exelon contracts and reactors as part of the settlement with Exelon, the plaintiffs' contract and takings claims here, which they assigned to Exelon prior to the Government's settlement with Exelon, should be barred.

With regard to the PSEG Nuclear assignments, we are not aware of any notice to the Department of Energy ("DOE") of those assignments outside of this litigation, as required by the Standard Contract. Nevertheless, we have never affirmatively challenged those assignments in these cases. The claims that the plaintiffs have asserted before this Court, which relate to or arise from ownership interests or the sale of ownership interests in PSEG Nuclear's nuclear reactors, were all purportedly assigned to PSEG Nuclear. Those claims involve allegations that PSEG Nuclear was the beneficiary of a reduction in the purchase price for the plaintiffs' interests in the PSEG Nuclear reactors, and any such claims would be offset by the benefits that PSEG Nuclear obtained through such a price reduction. Accordingly, the Government is exercising its sole discretion to accept the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent

that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case.

With this clarification, and for the reasons set forth in the Government's prior briefing, we respectfully request that the Court dismiss the plaintiffs' claims here.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JEANNE E. DAVIDSON
Director